STATE OF MICHIGAN

COURT OF APPEALS

DONALD KUKLA and LAURA KUKLA,[1]

Plaintiffs-Appellees,

v

BROOKS BEVERAGE MANAGEMENT, INC., and WILLIAM MCDONALD,

Defendants-Appellants.

UNPUBLISHED
August 23, 2002

No. 221996
Saginaw Circuit Court
LC No. 98-022961-CZ

Before: Hood, P.J., and Holbrook, Jr. and Owens, JJ.

PER CURIAM.

Defendants Brooks Beverage Management, Inc. ("defendant BBMI") and William McDonald appeal by leave granted from an order partially denying their motion for summary disposition. We reverse.

Plaintiff's lawsuit alleged, in pertinent part, that defendants violated the Persons with Disabilities Civil Rights Act ("PWDCRA"), MCL 37.1101 *et seq.*, by: (i) denying him the opportunity to work in a first-shift clerical position; (ii) denying his multiple requests to be placed in third-shift warehouse managerial positions; and (iii) cutting his hours and preventing him from working overtime. Plaintiff further alleged that defendant McDonald's actions on February 18, 1998, constituted unlawful retaliation pursuant to MCL 37.1602. Defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) was denied as to these claims, as was a subsequent motion for reconsideration.[2] We granted defendants' application for leave to appeal the trial court's partial denial of their motion for summary disposition.

[1] This plaintiff testified that her name was spelled Lori. It should be noted that the trial court granted defendants' motion to dismiss her only claim, and this ruling is not challenged on appeal. Thus, we will refer to plaintiff Donald Kukla as "plaintiff."

[2] In addition, the complaint included a claim that defendants failed to make reasonable accommodations for plaintiff, as well as a claim regarding a forklift accident. However, defendants' motion for summary disposition was granted as to these claims. This appeal does not concern any of the claims dismissed by the trial court's partial grant of defendants' motion for summary disposition.

Generally, we review de novo a trial court's ruling on a motion for summary disposition. *Haliw v Sterling Heights*, 464 Mich 297, 301; 627 NW2d 581 (2001). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), we consider "the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion." *Id.* at 302. "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Id.* "'[I]f, on the basis of the evidence presented, reasonable minds could not differ, then the motion for summary disposition should be granted.'" *Jackson v Saginaw Cty*, 458 Mich 141, 146; 580 NW2d 870 (1998), quoting *Vermilya v Dunham*, 195 Mich App 79, 83; 489 NW2d 496 (1992).

Initially, we note that the "PWDCRA was enacted with the purpose of ensuring 'that all persons be accorded equal opportunities to obtain employment, housing, and the utilization of public accommodations, services, and facilities.'" *Chiles v Machine Shop, Inc*, 238 Mich App 462, 473; 606 NW2d 398 (1999), quoting *Stevens v Inland Waters, Inc*, 220 Mich App 212, 216; 559 NW2d 61 (1996). In an employment context, MCL 37.1202(1) provides, in pertinent part, that an employer shall not:

> (a) Fail or refuse to hire, recruit, or promote an individual because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> (b) Discharge or otherwise discriminate against an individual with respect to compensation or the terms, conditions, or privileges of employment, because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.
>
> (c) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive an individual of employment opportunities or otherwise adversely affects the status of an employee because of a disability or genetic information that is unrelated to the individual's ability to perform the duties of a particular job or position.

In *Chiles*, we explained that a prima facie case of employment discrimination requires a plaintiff to show that: "(1) he is 'disabled' as defined by the statute, (2) the disability is unrelated to the plaintiff's ability to perform the duties of a particular job, and (3) the plaintiff has been discriminated against in one of the ways set forth in the statute." *Chiles, supra* at 473. The plaintiff bears the burden of demonstrating a prime facie case of discrimination under the PWDCRA. *Kerns v Dura Mech Components, Inc*, 242 Mich App 1, 12; 618 NW2d 56 (2000). If the plaintiff satisfies this burden, the burden then shifts to the defendant to articulate a "legitimate, nondiscriminatory reason" for the action. *Id.* at 12. If the defendant meets this burden, the plaintiff "must then 'prove by a preponderance of the evidence that the legitimate reason offered by the defendant was a mere pretext.'" *Rollert v Dep't of Civil Service*, 228 Mich App 534, 538; 579 NW2d 118 (1998), quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 711; 565 NW2d 401 (1997). A "mere pretext" may be proven "(1) by showing that the reason(s) had no basis in fact, (2) if the reason(s) had a basis in fact, by showing that they were not actual factors motivating the decision, or (3) if the reason(s) were motivating factors, by showing that they were jointly insufficient to justify the decision." *Id.* at 712.

In regard to plaintiff's removal from the first-shift clerical position, defendants contend that summary disposition was appropriate because they had a legitimate, non-discriminatory reason for removing plaintiff from the position. Indeed, defendant McDonald attested that, despite ten months in the position, plaintiff had not acquired the necessary typing or word processing skills. Defendant McDonald further indicated that it was "essential" for the first-shift clerical employee to handle payroll and accounts payable tasks. No evidence was introduced establishing that plaintiff could perform these tasks or that these tasks were not essential to the first-shift clerical position. Moreover, there was no dispute that plaintiff's replacement, Liz Coxon, could perform these tasks. As such, reasonable minds could not differ in concluding that defendants had a legitimate, non-discriminatory reason for replacing plaintiff.

Further, other than his mere assertions, plaintiff failed to introduce any evidence supporting his theory that the above reason was "mere pretext." *Meagher, supra* at 712. Thus, reasonable minds could not find that the decision to remove plaintiff from the first shift was mere pretext. Moreover, although plaintiff claimed that he was denied training, plaintiff was unable to provide any dates where he was denied the opportunity to attend training. Accordingly, there is no factual basis to conclude that plaintiff was denied the opportunity to acquire skills before his removal from the first-shift.[3] Thus, even viewed in a light most favorable to plaintiff, the training issue is insufficient to create a material question of fact as to whether his removal was pretextual. Consequently, we conclude that the trial court erred by denying defendants' motion for summary disposition as to this claim. *Jackson, supra* at 146.

Defendants also contend that the trial court erroneously denied their motion for summary disposition regarding plaintiff's claim based on his requests to be placed in a warehouse managerial position. Defendants introduced affidavits from three of the individuals that were placed in that position. Each attested that the essential job functions required the ability to bend, twist, reach, lift, climb, carry, and walk. Plaintiff conceded that he could not perform the physical aspects of the position. Accordingly, reasonable minds could only find that plaintiff's disability was related to his ability to perform this job. *Chiles, supra* at 473. Thus, plaintiff failed to establish a prima facie case of discrimination under the PWDCRA. *Id.* Therefore, we conclude that the trial court erred by denying defendants' motion for summary disposition on this ground. *Jackson, supra* at 146.

Defendants also claim that the trial court erred by denying their motion for summary disposition regarding plaintiff's claim based on the reduction of his hours and the denial of overtime. It should be noted that plaintiff's claim focused on the disparate treatment between himself and other "similarly situated" employees. In other words, plaintiff's discrimination claim was based on his allegation that similarly situated, non-disabled employees did not have their hours reduced or were prevented from working overtime.

A prima facie case of employment discrimination based on "disparate treatment," requires a plaintiff to show that he or she was a member of a class entitled to protection under

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[3] To the extent that plaintiff was denied training following his removal from the first-shift in favor of his replacement, we believe that it would certainly be reasonable for defendants to enhance the skills of the person in that position.

the statute and that he or she "was treated differently than persons of a different class for the same or similar conduct." *Meagher, supra* at 716. In addition, to establish that the comparable employees were "similarly situated," a plaintiff must show that all of the "relevant aspects" of the comparable employee's jobs were "nearly identical." *Smith v Goodwill Industries of West Michigan, Inc*, 243 Mich App 438, 448-449; 622 NW2d 337 (2000), quoting *Town v Michigan Bell Telephone Co*, 455 Mich 688, 700; 568 NW2d 64 (1997).

Here, plaintiff conceded that Coxon was the only employee who did work remotely similar to his work. However, plaintiff conceded that she had typing skills that he did not have, and that he could not "do accounts receivable" or "inventory control." Moreover, unlike Coxon, plaintiff was allowed to begin his shift ninety minutes earlier than normal, and had abused that privilege in the past. Thus, it is not clear that plaintiff was "similarly situated" to Coxon. Regardless, plaintiff conceded that he was able to work as long as necessary to complete his tasks. Thus, it is undisputed that the only aspect of plaintiff's employment that changed was his starting time.[4] Ultimately, there was no evidence that plaintiff's hours were reduced or that he was prevented from working overtime by defendants' attempts to enforce a 1:30 p.m. starting time. As such, even if Coxon and plaintiff were "similarly situated," reasonable minds could not differ in finding that plaintiff was not treated differently than Coxon. *Jackson, supra* at 146. As a result, plaintiff failed to establish a prima facie case of disparate treatment. *Meagher, supra* at 716. Consequently, the trial court erred by denying defendants' motion for summary disposition regarding this claim. *Jackson, supra* at 146.

Finally, defendants contend that the trial court erred by denying their motion for summary disposition regarding plaintiff's retaliation claim. MCL 37.1602(a)[5] provides, in pertinent part, that an individual or entity shall not: "Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act."

In *Mitan v Neiman Marcus*, 240 Mich App 679, 681; 613 NW2d 415 (2000), we noted that a prima facie case of unlawful retaliation contrary to the PWDCRA requires a plaintiff to show: "(1) that he engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action." Here, the trial court denied defendants' motion for summary disposition, finding that there was a material factual dispute regarding the first element—whether plaintiff was engaged in a protected activity. However, although plaintiff challenged the alteration of his time cards, there is no indication that

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[4] To be sure, plaintiff contended that Coxon abused the system by doing his work on her shift, thereby reducing his work supply. However, plaintiff's contention only suggests that Coxon caused a reduction in his hours, not defendants. Moreover, we note that there is no dispute that, following the "heated exchange," defendant McDonald ordered Coxon to start work on time and do her own work.

[5] Although plaintiff's brief also references MCL 37.1602(f), this subsection concerns property issues, such as acquiring, renting, and maintaining property. See MCL 37.1103(d)(1)(D). Accordingly, subsection (f) is not relevant.

his challenge referenced disability discrimination. In other words, plaintiff never contended that the time card alteration was based on his disability, nor did he invoke the PWDCRA when challenging defendants' actions. In sum, plaintiff failed to introduce any evidence establishing that defendants knew that he was engaged in a protected activity. Accordingly, reasonable minds could not differ in concluding that plaintiff failed to satisfy an element essential to a retaliation claim under the PWDCRA. *Mitan, supra* at 681. Consequently, we conclude that the trial court erred by denying defendants' motion for summary disposition regarding plaintiff's retaliation claim. *Jackson, supra* at 146.

Reversed.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.
/s/ Donald S. Owens